

noted the following factors concerning the transaction between MCI and BT: (1) 80 percent of MCI's directors, and 100 percent of its officers, are U.S. citizens; (2) because the Title III licenses in question are for common carriage, MCI exercises no control over the content of the transmissions, and thus no concern of alien control of radio transmissions arises; and (3) BT's large cash infusion will enable MCI to improve its networks and services, and thus the American consumer, economy, and work force will all benefit.⁶¹ Upon these findings, the FCC concluded, "that the proposed 3% fluctuation in non-BT alien ownership above the 25% statutory benchmark is not inconsistent with the public interest."⁶²

MCI quickly used the BT capital to fuel its ambition to become a full-service provider. In May 1995, MCI entered the cellular telephony business by purchasing America's largest cellular reseller, Nationwide Cellular, for \$190 million in cash.⁶³ That same month, MCI secured a source of content to deliver over its expanding information networks by committing to acquire 13.5 percent of News Corp. for \$2 billion.⁶⁴ As part of the News Corp. agreement, MCI agreed to contribute \$200 million to a joint venture between the two companies.⁶⁵ MCI has also committed another \$2 billion to MCI Metro,⁶⁶ MCI's project to enter the local access market through deployment of interactive broadband networks in

61. *MCI*, 9 F.C.C. Rcd. at 3964.

62. *Id.*

63. Richard Waters, *MCI pays Dollars 190m for wireless business*, FIN. TIMES, May 23, 1995, at 25; *MCI Buys Nationwide Cellular for \$190 Million*, N.Y. TIMES, May 23, 1995, at D4.

64. Alan Cane, *World alliance formed by MCI and News Corp.*, FIN. TIMES, May 11, 1995, at 1.

65. Edmund L. Andrews & Geraldine Fabrikant, *MCI and Murdoch to Join in Venture for Global Media*, N.Y. TIMES, May 11, 1995, at A1.

66. Mike Mills, *MCI Poised For More Changes; Cellular Phone Firm Alliance Expected*, WASH. POST, July 28, 1995, at C1.

urban areas.⁶⁷ If not for the cash infusion from BT's direct investment, MCI probably could not have undertaken these initiatives.

*Sprint, France Télécom,
and Deutsche Telekom*

Still awaiting FCC approval as of mid-1995 is the sale of a 20 percent equity interest in Sprint, the third largest U.S. long-distance provider, to France Télécom and Deutsche Telekom, the state-owned telecommunications monopolies of France and Germany. In June 1994, the three companies announced plans to form a global telecommunications alliance.⁶⁸ By June 1995, they had signed a definitive agreement to form their proposed venture. Under the terms of the agreement, France Télécom and Deutsche Telekom will each purchase a 10 percent interest in Sprint for a total of \$4.1 billion.⁶⁹ In addition, the three telecommunications operators will each contribute one-third to a joint venture called Phoenix, which will provide end-to-end international telecommunications services to multinational corporations.⁷⁰ By forging their relationship with Sprint, France Télécom and Deutsche Telekom are extending the reach of a European alliance, called Atlas, which the two operators had already agreed to form between themselves.⁷¹ The three companies estimate that, within approximately one year after receiving all the requisite approvals, Phoenix will

67. MCI COMMUNICATIONS CORP., 1993 ANNUAL REPORT 19 (1994).

68. Andrew Adonis, *US telecoms alliance for France and Germany: Dollars 4bn stake in Sprint*, FIN. TIMES, June 15, 1994, at 1; Tom Redburn, *Sprint Forms European Alliance*, N.Y. TIMES, June 15, 1995, at D3.

69. Tony Jackson & Alan Cane, *Sprint signs deal with European partners*, FIN. TIMES, June 23, 1995, at 15.

70. *With Variations, Sprint Announces European Pact*, N.Y. TIMES, June 23, 1995, at B2.

71. RICHARD CRANSTON, *LIBERALISING TELECOMMUNICATIONS IN WESTERN EUROPE* 111 (Financial Times Business Information 1995).

generate more than \$500 million in revenue, employ more than 2,000 people, and offer service in over fifty countries.⁷² They also suggest that the venture could be operational within fifty days of receiving regulatory approval.⁷³

The three operators need the approval of the EC in Europe and the U.S. Justice Department and FCC. In July 1995, the Department of Justice gave Sprint approval to proceed with the alliance.⁷⁴ As a condition of Justice Department approval, Sprint, France Télécom, and Deutsche Telekom entered into a consent decree that stipulates that they will not give preferential treatment to one another until the French and German telecommunications markets are opened to U.S. carriers.⁷⁵ EC and FCC approval of the deal, however, may take longer.⁷⁶ The EC fears that Europe may become closed to competition before potential entrants ever have a chance to enter the market, and the FCC still has pending proposed rules on foreign ownership and entry by foreign carriers.⁷⁷ Neither EC nor FCC approval will likely come before the French and German governments present definite plans to liberalize their telecommunications markets.⁷⁸ The MCI/BT alliance (which thus far is the only global alliance to have received full regulatory approval from the U.S. and the EC) and the alliance among Sprint, France Télécom, and Deutsche

72. Gautam Naik, *Sprint Signs \$4.1 Billion Agreement With French, German Phone Carriers*, WALL ST. J., June 23, 1995.

73. *With Variations, Sprint Announces European Pact*, *supra* note 70, at B2.

74. Leslie Cauley, *Sprint Alliance In Europe Receives Approval in U.S.*, WALL ST. J., July 14, 1995, at B3.

75. *Id.*

76. Alan Cane, *Telecom giant has problem getting through: Regulators could scuttle global alliance*, FIN. TIMES, July 28, 1995, at 2.

77. Market Entry and Regulation of Foreign-affiliated Entities, Notice of Proposed Rulemaking, IB Dkt. No. 95-22, 10 F.C.C. Rcd. 5256 (1995).

78. Emma Tucker, *Van Miert renews attack on Franco-German telecoms link*, FIN. TIMES, June 14, 1995, at 3.

Telekom have one conspicuous difference: BT is a privatized company operating in a fully liberalized domestic market, whereas France Télécom and Deutsche Telekom are still state-owned and their respective governments are inhibited by domestic political constituencies from moving swiftly toward market liberalization.

Like BT's investment in MCI, the investment of France Télécom and Deutsche Telekom is essential to Sprint's ambitious plans for domestic expansion. Sprint is a 40 percent partner in WirelessCo, L.P., a partnership with Tele-Communications Inc. (TCI), Comcast Corporation, and Cox Communications. TCI owns 30 percent of the partnership, and Comcast and Cox each owns 15 percent.⁷⁹ WirelessCo is the mechanism by which these four companies intend to compete in the U.S. telecommunications market as full-service, end-to-end providers.

The four companies are pursuing both wireless and wireline strategies. With regard to wireless, WirelessCo plans to provide a nationwide PCS service under the Sprint brand name. WirelessCo was the high bidder in the PCS auctions, paying \$2.1 billion for twenty-nine licenses, including New York, San Francisco, Detroit, Dallas, and Boston; in comparison, AT&T/McCaw bid \$1.7 billion for twenty-one licenses.⁸⁰ WirelessCo and its PCS affiliates will cover an area in the U.S. with a population of 182.4 million.

With regard to their wireline strategy, the four companies plan to enter the local exchange business in areas not already covered by Sprint's LECs. The WirelessCo partnership expects to use the cable plant of the partners and other affiliates as the primary vehicle for wireline competition with the LEC incumbent.⁸¹ WirelessCo will supplement the existing

79. SPRINT CORP., 1994 SEC FORM 10-K, at 5 (1995).

80. Ronald Grover, *TCI's Endless Morning After*, BUS. WK., Apr. 10, 1995, at 60.

81. SPRINT CORP., 1994 SEC FORM 10-K, at 5 (1995).

wire-based infrastructure with an extensive broadband network buildout. Infrastructure buildout, including wireline network development and interconnection, will cost at least another \$2.3 billion.⁸² Full rollout of a wireline video and telephony service will not likely occur until late 1996 or even 1997.

Sprint needs the capital infusion from the direct investment by France Télécom and Deutsche Telekom. In 1994, the Sprint had over \$4.5 billion in debt.⁸³ The company is committed to contribute, by 1998 or 1999, \$1.67 billion to the Sprint-cable partnerships,⁸⁴ but its expected cash flow has fallen because of an advertising war in long-distance services.⁸⁵

*Telefónica de España and
Telefónica Larga Distancia de Puerto Rico*

In 1992, the FCC approved the purchase of the state-owned Puerto Rican long-distance telephone company, Telefónica Larga Distancia de Puerto Rico (TLD), by a subsidiary of Telefónica de España (Telefónica).⁸⁶ To gain FCC approval, Telefónica structured its purchase to avoid section 310(b)'s restrictions on Title III radio licenses.

To appreciate the limited implications of the FCC's approval of the TLD acquisition, one must understand the history of telecommunications services in Puerto Rico. The Puerto Rican telephony market is divided between local access and long-distance services. The Puerto Rico Telephone Com-

82. Mark Berniker, *Sprint, cable partners plan phone service*, BROADCASTING & CABLE, Apr. 3, 1995, at 39.

83. SPRINT CORP., 1994 SEC FORM 10-K, at F-2 (1995).

84. Berniker, *supra*, note 82, at 39.

85. John J. Keller, *Sprint's 4th-Quarter Earnings Expected To Fall as Much as 10% Below Estimates*, WALL ST. J., Dec. 15, 1994, at A4.

86. Telefónica Larga Distancia de Puerto Rico, 8 F.C.C. Rcd. 106 (1992) [hereinafter *TLD*].

pany (PRTC) has a monopoly on local exchange services.⁸⁷ The Puerto Rico Telephone Authority (PRTA), a public agency of the Commonwealth of Puerto Rico, purchased PRTC from All America Cables & Radio (AAC&R) in the early 1970s.⁸⁸ Until 1987, AAC&R had a monopoly over the long-distance market; in 1987, AT&T purchased that monopoly.⁸⁹ In the late 1980s, the PRTA created the predecessor of TLD to compete with AAC&R (and subsequently AT&T) in the provision of long-distance service, particularly outbound off-island service originating in Puerto Rico. In 1988, after years of petitioning by TLD, the FCC authorized TLD to compete in the provision of long-distance telephone service.⁹⁰ The company commenced service in 1989.⁹¹ TLD provides international services both as a reseller and as a facilities-based provider.⁹² The PRTA owned 100 percent of TLD when Telefónica filed its petition to purchase a majority share of the company.⁹³

Four carriers provide long-distance services that are available to most of Puerto Rico's 1.1 million access lines.⁹⁴ TLD is the principal competitor to AT&T, the former monopoly provider of outgoing off-island telecommunications services from Puerto Rico. Measured in total minutes, AT&T has

87. *Id.*

88. Statement of Telefónica Larga Distancia de Puerto Rico, Inc. in Opposition to AT&T Petition for Rulemaking, Market Entry and Regulation of International Common Carriers With Foreign Carrier Affiliations, RM-8355, at 3 (filed Nov. 1, 1993)

89. DONALD L. MARTIN, ECONOMIC BENEFITS TO PUERTO RICO FROM VIGOROUS TELECOMMUNICATIONS COMPETITION 11 (Glassman-Oliver Economic Consultants, Inc., June 27, 1994) [hereinafter GLASSMAN-OLIVER REPORT].

90. Telefónica Larga Distancia de Puerto Rico, 3 F.C.C. Rcd. 5937 (1988).

91. GLASSMAN-OLIVER REPORT, *supra* note 89, at 6.

92. TLD, 8 F.C.C. Rcd. at 106.

93. *Id.*

94. GLASSMAN-OLIVER REPORT, *supra* note 89, at 3.

59.9 percent of the market; TLD has 21.6 percent; and Sprint and MCI respectively have 7.0 and 6.5 percent.⁹⁵ In a region where years of monopoly control left only 65.8 percent of households with telephone service, the competition provided by TLD and the others has yielded a significant gain in consumer welfare.⁹⁶ Economists estimate that competition in off-island service has saved consumers \$578 million since it was introduced.⁹⁷

To purchase TLD, Telefónica formed a Puerto Rican corporation, called LD, to act as the acquisition company. Under the terms of the acquisition agreement, Telefónica International Holding, B.V. (TI Holding), a Netherlands corporation, owned 79 percent of LD upon closing.⁹⁸ Telefónica Internacional de España, S.A. (TISA), a Spanish corporation, owns 100 percent of TI Holding.⁹⁹ Telefónica de España, Spain's government-controlled telecommunications operator, in turn, owns 76.22 percent of TISA;¹⁰⁰ the Spanish government owns the remainder.¹⁰¹ Under the terms of the transaction, the PRTA retained 19 percent of TLD.¹⁰² TISA, through TI Holding, owns 79 percent of TLD,¹⁰³ and the remaining 2 percent is held in an employee stock ownership plan.¹⁰⁴

To avoid the foreign ownership restrictions, Telefónica acquired only those assets of TLD that did not require Title III licenses, including the current and pending section 214

95. *Id.* at 4.

96. *Id.* at 10.

97. *Id.* at i.

98. *TLD*, 8 F.C.C. Rcd. at 107.

99. *Id.*

100. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 13 (1994).

101. Comments of Telefónica Larga Distancia de Puerto Rico, Inc., Market Entry and Regulation of Foreign-Affiliated Entities, Notice of Proposed Rulemaking, IB Dkt. No. 95-22, at 3 n.3 (filed Apr. 11, 1995).

102. *TLD*, 8 F.C.C. Rcd. at 107.

103. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 13 (1994).

104. *TLD*, 8 F.C.C. Rcd. at 107.

licenses to provide international services and to own, operate, and maintain the necessary facilities.¹⁰⁵ Assets of TLD that required Title III licenses, and consequently were subject to sections 310(a) and 310(b), were transferred to a newly formed Puerto Rican corporation, Telecomunicaciones Ultramarinas de Puerto Rico (TUPR).¹⁰⁶ The PRTA owns 85.1 percent of TUPR; TISA, through TI Holding, owns 14.9 percent.¹⁰⁷ TLD leases access to TUPR's Title III assets.¹⁰⁸

Although Telefónica structured its investment in TLD to avoid problems under section 310(b), the FCC still scrutinized the transaction under a similar public interest test pursuant to section 214. Telefónica suggested, and the FCC concurred, that significant benefits would flow from the infusion of capital and the privatization of the government-owned Puerto Rican long-distance operator. AT&T, along with other opponents to the transaction, argued that allowing Telefónica de España to assume control of a U.S. facilities-based telecommunications operator would: (1) allow Telefónica to leverage its domestic market power in Spain to injure competition in the U.S. marketplace; (2) perpetuate high, non-cost-based accounting rates; and (3) raise troubling trade policy issues by permitting foreign access to U.S. telecommunications markets while the corresponding foreign market remained closed.¹⁰⁹ Although the FCC noted that "the long-term solution to foreign market power, which can be abused in the United States with or without a U.S. carrier-affiliate, is greater liberalization in foreign markets," the agency, over AT&T's objections, declined to apply a strict policy of reciprocal market entry.¹¹⁰ The FCC found that its nondiscrimination safeguards

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 108 n.13.

110. *Id.* at 109.

are sufficient to protect U.S. carriers from discrimination that may occur as a result of the imbalance between relative market access, and that the facilities-based authorizations that the agency had granted to Spain and other countries are very limited and thus unlikely to cause competitive abuse.¹¹¹ It is possible that the FCC's public interest determination also was influenced by the fact that TLD was an upstart challenging the former monopolist, although the agency did not explicitly mention that consideration as a factor justifying its conclusion that it was in the public interest to approve Telefónica's acquisition of control of TLD.

BT and McCaw

In 1989, the FCC approved a purchase by British Telecom's U.S. subsidiary of a significant equity stake in McCaw Cellular Communications, America's largest cellular operator.¹¹² BT acquired just over a 22 percent interest, and as of 1993, the company owned 17 percent of McCaw's total equity (constituting 21 percent of the voting interest).¹¹³ BT is no longer a McCaw shareholder because in September 1994 McCaw became a wholly owned subsidiary of AT&T.¹¹⁴ As a result of AT&T's purchase of McCaw, BT became a significant shareholder in AT&T.¹¹⁵ In January 1995, BT sold its 35.9 million shares of AT&T, a 2.3 percent stake, for approximately \$1.76 billion.¹¹⁶

In other words, several years before its investment in

111. *Id.*

112. McCaw Cellular Comm., Inc., 4 F.C.C. Rcd. 3784 (1989).

113. BRITISH TELECOMMUNICATIONS PUB. LTD. CO., 1994 SEC FORM 20-F, at 6 (1994).

114. AT&T CORP., 1994 SEC FORM 10-K, at 4 (1995).

115. *British Telecom Sale of AT&T Stock to Proceed*, N.Y. TIMES, Jan. 14, 1995, at 41.

116. *AT&T Says British Telecom Will Sell Stock Holdings*, N.Y. TIMES, Jan. 27, 1995, at D3.

MCI, BT had already made the most substantial foreign direct investment in a U.S. wireless company since the days of British Marconi. Although BT's brief investment is now a relic, the story remains important because it shows how the foreign ownership restrictions of section 310(b) significantly shaped an investment by one of the world's largest telecommunications operators in the then-emergent U.S. cellular market.

McCaw is a U.S. corporation. Through subsidiaries, McCaw holds cellular, paging, and other radio licenses.¹¹⁷ At the time of the transaction with BT, the owners of McCaw stock were as follows: members of the McCaw family held 41 percent of the equity, comprising 46.24 percent of the voting interest; Affiliated Publications, Inc. (Affiliated) held 47.1 percent of the equity, comprising 52.02 percent of the voting interest; and public shareholders held the remaining 47.1 percent of the equity, comprising 1.74 percent of the voting interest.¹¹⁸ Affiliated was a widely held, publicly traded corporation, with its principal business in newspaper publishing.¹¹⁹ Pursuant to a shareholders' agreement, Affiliated was obligated to vote a sufficient number of its shares in accordance with instructions from Craig McCaw so that he could always command a majority vote.¹²⁰

At the time of the BT/McCaw transaction, McCaw had initiated a merger with Affiliated whereby the latter company would spin off its McCaw interest to its own shareholders. The outcome of the proposed reorganization had little impact on the FCC's opinion of the BT/McCaw transaction, however, because Craig McCaw would control over 80 percent of the voting interest once the restructuring transpired, and he would

117. *McCaw*, 4 F.C.C. Rcd. at 3784.

118. *Id.* at 3784.

119. *Id.*

120. *Id.*

control a majority of the voting interest if it did not.¹²¹

BT purchased its McCaw interest through its wholly owned American subsidiary, British Telecom USA, a Delaware corporation.¹²² At the time of the McCaw transaction, the British government owned 49 percent of BT (then called British Telecom).¹²³ BT initially acquired 22.4 percent of the total equity and 22.4 percent of the voting interest but later reduced its holding to the levels stated above.¹²⁴ Under the agreement, McCaw expanded its board of directors from thirteen directors to nineteen directors. McCaw had the right to nominate ten directors (all of whom had to be U.S. citizens); Affiliated had the right to nominate two directors (all of whom had to be U.S. citizens); Craig McCaw had the right to nominate three independent directors (all of whom had to be U.S. citizens); and BT had the right to nominate four directors.¹²⁵ Thus, under the agreement, BT had the opportunity to appoint foreign nationals as just over one-fifth of the directors, or slightly less than the maximum one-fourth specified in section 310(b)(4). In addition to its board representation, BT had the power to veto certain corporate actions that could injure BT's interests.¹²⁶

The agreement between McCaw and BT stipulated three conditions to ensure that BT's interest in the U.S. cellular operator would never violate section 310(b). First, both parties agreed that cumulative alien ownership (including non-BT interests) in McCaw would never exceed the 25 percent benchmark in section 310(b). Second, under its articles of incorporation and the agreement between the two parties, McCaw had the right to redeem stock held by foreigners to

121. *Id.* at 3791.

122. *Id.* at 3784.

123. *Id.*

124. *Id.* at 3785.

125. *Id.*

126. *Id.*

ensure compliance with section 310(b). Third, the terms of the agreement required periodic surveying of alien ownership.¹²⁷

The FCC noted that the relevant foreign ownership provision was section 310(b)(4) because BT was purchasing a stake in the U.S. parent corporation of a number of radio licensees.¹²⁸ The agency then quickly dismissed any foreign ownership concerns because BT's interest in McCaw was less than 25 percent, foreign directors constituted less than one-fourth of McCaw's board, and all McCaw officers were U.S. citizens.¹²⁹ The FCC further noted that the British government's 49 percent ownership interest in BT at the time of the transaction made no difference in the outcome because section 310(b)(4) allows foreign governments, along with foreign individuals and corporations, to invest in the parent companies of American radio licensees, so long as the ownership interests fall within the confines of the ownership and control restrictions.¹³⁰

Although the FCC did not conduct its public interest analysis of the transaction to resolve the question of permissible foreign ownership, it did so to determine whether BT's stock purchase complied with the requirements of section 310(d) concerning transfers of control.¹³¹ As chapter 4 discussed, the FCC defined "control" in *McCaw* as the ability "to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue."¹³² After stating that a minority shareholder will not be deemed to have control unless that shareholder has such significant influence over the licensee as to be able to dominate corporate affairs, the FCC concluded that BT, as a 22.4 percent share-

127. *Id.*

128. *Id.* at 3790.

129. *Id.*

130. *Id.*

131. *Id.* at 3788-90.

132. *Id.* at 3789.

holder, did not receive control through its acquisition because Craig McCaw still had the majority voting interest and BT's ability to veto certain corporate actions conferred no ability to compel McCaw to select a particular course of action.¹³³ And, although the terms of the agreement precluded McCaw from entering the U.K. cellular market, the FCC concluded that this prohibition did not affect the determination of control because the restraint was limited in scope and did not reduce the ability of other U.S. cellular providers to enter the U.K. cellular market.¹³⁴

Even though it concluded that BT's purchase of McCaw stock did not constitute transfer of control subject to section 310(d), the FCC went on to say that the transaction was in the public interest for three reasons. First, BT's large cash infusion would strengthen McCaw's financial resources. Second, BT would bring to McCaw "substantial experience, expertise and knowledge" in telecommunications and, more specifically, in cellular telephony. Third, because no horizontal integration would result from BT's investment, American consumers would benefit from enhanced competition in the U.S. cellular market.¹³⁵

BT's investment helped fuel McCaw's rapid expansion. Shortly after BT paid \$1.5 billion to McCaw,¹³⁶ McCaw used the cash and the additional debt made available by the cash infusion to purchase LIN Broadcasting, thereby establishing a nationwide footprint for its cellular operation.¹³⁷ In March 1990, McCaw made a \$3.38 billion cash tender offer for 21.9 million shares of LIN Broadcasting, a large cellular operator,

133. *Id.*

134. *Id.* at 3790.

135. *Id.*

136. Jeremy Warner, *BT in costly pursuit of the holy grail*, THE INDEPENDENT, Nov. 8, 1992, at 2.

137. Geraldine Fabrikant, *LIN Backs Takeover By McCaw*, N.Y. TIMES, Dec. 5, 1989, at D1.

raising McCaw's share in LIN to 51.9 percent.¹³⁸ At the time of the transaction, McCaw and LIN together operated in 119 markets, including five of the ten largest U.S. cities, with licenses covering 70 million people.¹³⁹ Later, AT&T, in search of an expeditious way to enter cellular telephony, purchased McCaw for approximately \$12.6 billion in stock and the assumption of nearly \$7 billion more in existing McCaw debt.¹⁴⁰

Cable & Wireless

Cable & Wireless plc provides telecommunications services in the U.S. through its American subsidiary, Cable & Wireless, Inc. (CWI). Section 310(b) has significantly shaped this large British telecommunications operator's participation in the U.S. market. CWI is a facilities-based provider and a reseller of domestic long-distance telecommunications services in the U.S.; additionally, CWI provides international long-distance service, primarily on a resale basis.¹⁴¹ The company had over \$600 million in revenue during its 1994 fiscal year and more than 2,400 employees.¹⁴² But with only 1 percent of the U.S. long-distance market, the company ranks a distant fifth behind the big three U.S. long-distance companies and LDDS/WorldCom.¹⁴³ CWI also provides intrastate telecommu-

138. Geraldine Fabrikant, *McCaw Complete Bid For Rest of Lin's Stock*, N.Y. TIMES, Mar. 6, 1990, at D6.

139. Roderick Oram, *LIN accepts 7bn Dollar McCaw bid*, FIN. TIMES, Dec. 5, 1994, at 21.

140. Edmund L. Andrews, *AT&T Paying \$12.6 Billion for McCaw Cellular*, N.Y. TIMES, Aug. 17, 1994, at A1.

141. CABLE & WIRELESS PLC, 1994 SEC FORM 20-F, at 73 (1994).

142. Jackie Spinner, *An All-Around Player at Cable & Wireless; Gabriel Battista to Head Long-Distance Carrier That Focuses on Smaller Businesses*, WASH. POST, July 3, 1995, at F9.

143. Eric Reguly, *AT&T still in talks on Mercury*, THE TIMES, May 4, 1995.

nications services in several states that allow competitive entry into the intraLATA market.¹⁴⁴ CWI appears to hold no interest in any U.S. radio licenses.

CWI focuses on providing telecommunications services to small to medium-sized businesses. Its strategy is to identify and market customized telecommunications services to specialized consumer groups. In January 1995, CWI announced the formation of Omnes, a joint venture with Schlumberger, the American oil field services and measurement company, which will provide customized global telecommunications services to the oil and gas industry; the industry spends approximately \$37 billion per year on information technology and telecommunications.¹⁴⁵ Omnes will manage and operate SINet, Schlumberger's private network, which operates in fifty-three countries.¹⁴⁶

CWI has also tried to enter the emerging American PCS market but has been limited to a non-equity role. In 1994, Cable & Wireless filed a petition with the FCC for a general waiver of the 25 percent limit for all U.K. citizens and corporations to enable CWI to purchase PCS spectrum rights that the FCC would shortly auction.¹⁴⁷ Rebuffed by the FCC, CWI will participate in the PCS market by supplying long-distance services to a partnership of small PCS licensees.¹⁴⁸ CWI has joined with AT&T to support a venture called North American Wireless, which will weave together a consortium of independent, small PCS operators to offer a nationwide, branded PCS service.¹⁴⁹

144. CABLE & WIRELESS PLC, 1994 SEC FORM 20-F, at 74 (1994).

145. Alan Cane, *C&W goes for US telecom link*, FIN. TIMES, Jan. 6, 1995, at 4.

146. *Id.*

147. Cable & Wireless, Inc., 1994 FCC LEXIS 155 (Jan. 12, 1994).

148. Gautam Naik, *Alliance Planned for National Wireless System*, WALL ST. J., Nov. 7, 1994, at A3.

149. Paul Wiseman, *Wireless deal to aid minorities, small firms*, USA TODAY, Nov. 7, 1994, at 1B.

BCE and Jones Intercable

In 1994, BCE, the Canadian telecommunications conglomerate, purchased 30 percent of Jones Intercable, America's seventh largest multiple systems operator (MSO).¹⁵⁰ Operating fifty-five cable systems in twenty-three states, Jones Intercable serves over 1.3 million basic cable subscribers.¹⁵¹ Through its international subsidiary, Bell Canada International (BCI), BCE agreed to invest \$400 million in the cable operator for nearly one-third of the total equity and an option to purchase a controlling share of Jones Intercable, exercisable in 2002.¹⁵² With its present equity stake, BCE has the ability to nominate six of Jones Intercable's thirteen directors.¹⁵³ Should BCE choose to exercise the option, it will have the power to elect 75 percent of the Jones Intercable board.¹⁵⁴ BCE and Jones Intercable are also equity partners in Bell Cablemedia, a cable television and telephony venture in the U.K.¹⁵⁵

BCE's investment in Jones Intercable apparently required no U.S. regulatory approval. The FCC's only influence over the transaction was to cause the parties to renegotiate the purchase price after the agency implemented rate reductions under the Cable Television Consumer Protection and Competition Act of 1992.¹⁵⁶

Jones Intercable identifies three reasons for the equity sale to BCE. First, Jones Intercable values BCE's telephony expertise as the cable company prepares for the joint offering of video and telephony services in the U.S. Second, BCE

150. JONES INTERCABLE, INC., 1994 ANNUAL REPORT 30 (1995).

151. BCE INC., 1994 SEC FORM 40-F, at 27 (1995).

152. *Id.*

153. *New Bell Canada-Jones Deal*, N.Y. TIMES, June 6, 1994, at D2.

154. JONES INTERCABLE, INC., 1994 ANNUAL REPORT 30 (1995).

155. Dinah Zeiger, *Jones completes 30 percent sale to Bell Canada*, DENVER POST, Dec. 20, 1994, at C1.

156. Dinah Zeiger, *Jones, Bell Canada amend deal in wake of FCC rate rollbacks, firms agree to alter timetable*, DENVER POST, Mar. 29, 1994, at C1.

offers Jones Intercable access to BCE's sophisticated telecommunications technology. Third, Jones Intercable considers the capital infusion critical to further Jones' strategic development.¹⁵⁷

CONCLUSION

There are few cases of significant foreign direct investment in U.S. telecommunications under the present regulatory structure. Of the six major ones, only two are old enough for their effects to be assessed anecdotally. In both cases, foreign investment led to greater consumer welfare. Telefónica de España's investment in TLD stimulated competition in the Puerto Rican long-distance market, and BT's investment in McCaw led to the first nationwide cellular network.

The U.S. recipients of other foreign direct investments have used or plan to use the capital in ways that can be expected to benefit American consumers. MCI has already allocated its \$4.3 billion from BT to pay for three different projects that will position the company to compete in local telephony, information services, and video programming. Sprint has committed huge sums to its domestic wireless and broadband initiatives even before receiving a single dollar from its proposed foreign investors. And Jones Intercable will use BCE's investment to fund the development of an interactive broadband network. We should expect a policy of greater hospitality toward foreign direct investment in the U.S. telecommunications industry to produce more of these kinds of benefits for American consumers.

157. JONES INTERCABLE, INC., 1994 ANNUAL REPORT 10-12 (1995)

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American Investment Abroad

AMERICAN INVESTMENT in foreign telecommunications markets is often precluded by regulation in the given foreign country. Despite an accelerating trend of privatization and liberalization, most nations maintain a government-owned telecommunications monopoly. Foreign direct investment in the telecommunications markets of these countries is typically prohibited or regulated—either through an express statutory limitation on foreign investment, implicitly through a limitation on the number of available telecommunications operator licenses, or through a system in which an applicant for a new telecommunications operating license will be rejected solely because it is a consortium that has a significant foreign investor. As a result of these various means of exclusion, the extent of American direct investment in telecommunications services markets around the world has reflected the perceived need in individual countries for American technology and operating expertise. For that reason, American direct investment in most European markets, the United Kingdom aside,

has been almost entirely in the wireless sector of the industry, whereas in South America for example, American direct investment has taken place not only in wireless, but also in the less developed wire-based industry.

This chapter surveys the telecommunications markets in countries from different regions around the world. The analysis begins with an examination of the markets belonging to America's trading partners under the North American Free Trade Agreement (NAFTA)—Canada and Mexico. We then examine selected members of the European Union, the varying market structures in certain Asian/Pacific countries, and the change occurring in several significant South American countries.

The analysis for most countries in each of these regions reveals a recurring theme: The foreign country opens certain sectors of its telecommunications industry to foreign investment only to the limited extent that country's government deems necessary. Typically, foreign telecommunications firms either acquire a minority stake in an existing domestic operator or assume a minority interest in a joint venture with a large domestic company having abundant financial resources, cultural understanding, and political clout but lacking telecommunications expertise. Foreign telecommunications firms have been willing to trade their technological expertise and marketing experience for a minority interest in the telecommunications operator because they believe that once they can get a "strategic foothold"—as AirTouch dubbed its equity participation in the Japanese wireless market¹—they will then have the ability to leverage that limited interest to a more pervasive participation in that country's telecommunications industry.

In turn, the strategic footholds of American telecommunications firms in foreign markets are likely to facilitate the

1. AIRTOUCH COMMUNICATIONS, INC., 1994 ANNUAL REPORT 64 (1995).

formation of a number of competing full-service networks that compete on a global scale, the first such networks being AT&T and the alliance between BT and MCI.² A super carrier of this sort would provide end-to-end global telecommunications for large multinational firms.³

AMERICA'S NAFTA PARTNERS

Mexico

In 1990, Mexico began a six-year process of privatization and liberalization of its telecommunications sector. Despite the progress that has been made so far during this period, foreign direct investment in the Mexican telecommunications industry remains relatively limited. The government maintains a 49 percent cap on foreign equity ownership, and, other than a minority interest held by France Telecom and SBC Communications in Teléfonos de México, S.A. de C.V. (Telmex), the former state-owned public telecommunications operator, most of the foreign investment in Mexican telecommunications as of 1995 is confined to the wireless sector. With the imminent expiration of Telmex's monopoly and the prime growth conditions that exist in Mexico's telecommunications industry, however, many potential entrants are poised to participate in the Mexican market.

Although chastened by the peso's devaluation in 1994 and 1995, the growth of the Mexican telecommunications market over the next two decades is expected to be substantial because of three factors: NAFTA, a relatively underdeveloped national telecommunications infrastructure, and rising per capita income. The telecommunications services market in

2. Julia Flynn, Catherine Arnst & Gail Edmondson, *Who'll Be the First Global Phone Company?*, BUS. WK., Mar. 27, 1995, at 176.

3. UNIVERSITY OF COLORADO INTERDISCIPLINARY TELECOMMUNICATIONS PROGRAM, TELECOMMUNICATIONS DATABASE REPORT, at 2-18 (1994).

Mexico currently generates over \$7 billion in annual revenue; by 2000, that number is expected to reach nearly \$20 billion.⁴ The long-distance telephony market alone is expected to grow by 12 to 22 percent annually for several years.⁵ But even with communications revenues expected to grow so rapidly, the line penetration rate in Mexico remains relatively low. Mexico has a population of 92 million people, but only 9.2 telephone lines per 100 people.⁶ These factors, along with the expectation that international telephony traffic originating or terminating in Mexico will increase significantly because of the growing presence of multinational firms (particularly American firms) in Mexico, make the Mexican telecommunications markets an attractive opportunity for direct investment by foreign telecommunications firms.⁷

Telephony. The Mexican Law on General Means of Communication (Communications Law), adopted in 1940, and the Telecommunications Regulations, adopted thereunder in October 1990, govern the telecommunications industry in Mexico.⁸ This statute and the corresponding regulations authorize the Secretaría de Comunicaciones de México (SCT) to administer and enforce the regulation of the industry.⁹ Under the Com-

4. Ted Bardacke, *Sprint links with Telmex and cancels Iusacell deal*, FIN. TIMES, Dec. 15, 1994, at 35.

5. Ted Bardacke, *Tough times for Telmex as Mexico prepares to open market—Dominant position threatened as telecoms company faces increasing competition without a big partner*, FIN. TIMES, Nov. 17, 1994, at 28 [hereinafter *Tough times for Telmex*].

6. INTERNATIONAL TELECOMMUNICATIONS UNION, WORLD TELECOMMUNICATION DEVELOPMENT 64 (1994) [hereinafter ITU WORLD DEVELOPMENT REPORT]; DILLON, READ & CO. INC., TELÉFONOS DE MÉXICO: ONE OF THE SURVIVORS 4 (Feb. 27, 1995) (written by Cynthia L. Rix).

7. Bardacke, *Tough times for Telmex*, *supra* note 5, at 28.

8. TELÉFONOS DE MÉXICO, S.A. DE C.V., 1993 SEC FORM 20-F, at 1 (1994).

9. Oscar M. Garibaldi & Raidza M. Torres, *Recent Developments in the Telecommunications Market in Canada, Latin America and the Caribbean*, in

munications Law and the Telecommunications Regulations, any entity wishing to provide public telecommunications services must first receive a concession granted by the SCT.¹⁰

Mexico restricts foreign ownership of a telecommunications operator in the following manner. Under the Communications Law and the Telecommunications Regulations, the SCT may grant a concession only to a Mexican citizen or corporation, and the concessionaire may not transfer or assign the concession without the SCT's approval.¹¹

Under the 1993 Foreign Investment Law and the 1989 Regulations adopted under the predecessor law, non-Mexican investors may not own more than 49 percent of the capital stock of a Mexican corporation operating in certain economic sectors, including telephone services.¹² The holdings of non-Mexican investors, however, may qualify as Mexican-owned if held through a trust that meets certain conditions to ensure that the non-Mexican investors do not determine how their shares are voted. Therefore, non-Mexican investors may own a majority of the telecommunications operator's voting stock if such ownership is held in a trust that effectively neutralizes the votes of the non-Mexican investors.¹³ An acquisition of shares by a non-Mexican investor in violation of the foreign investment restrictions voids any rights that the shareholder would have with respect to the violative shares. It would appear that this draconian sanction would even take away the investor's right to sell his shares, let alone his right to receive

FEDERAL COMMUNICATIONS BAR ASSOCIATION, INTERNATIONAL PRACTICE COMMITTEE, 1993 INTERNATIONAL COMMUNICATIONS PRACTICE HANDBOOK 251, 253 (Paul J. Berman & Ellen K. Snyder eds., 1993).

10. TELÉFONOS DE MÉXICO, S.A. DE C.V., 1993 SEC FORM 20-F, at 9 (1994).

11. *Id.* at 9.

12. *Id.* at 17.

13. *Id.* at 18.

dividends. Unlike the American rule, such a violation in no way affects the concessionaire.¹⁴

A further protective measure applies only to the ownership of Telmex. Both the Foreign Investment Law and Telmex's concession ensure that non-Mexican investors do not achieve administrative control and management of the company.¹⁵ Any violation of this restriction will void Telmex's concession.¹⁶

To ensure greater government control during times of crisis, the Communications Law gives certain rights to the Mexican government in its relations with concessionaires, including the right to assume the management and control in cases of imminent danger to national security or the national economy. The government exercised this power most recently in 1986 to ensure continued service during labor disputes.¹⁷

Finally, under the Communications Law and Telmex's bylaws, foreign states are prohibited from directly or indirectly owning shares of Telmex. Telmex has three classes of stock: AA, A, and L. The AA shares have full voting rights; the A and L shares do not. State-owned enterprises, such as France Telecom, organized as separate entities with their own assets, may own minority interests in Telmex's full-voting AA shares and may own an unlimited number of its limited-voting L and A shares.¹⁸

As of 1995, Telmex holds the only license to supply fixed-link telecommunications services in Mexico.¹⁹ Telmex provides basic telephone service, consisting of international and domestic long-distance, local service, and cellular mobile

14. *Id.* at 18.

15. *Id.* at 18.

16. *Id.* at 18.

17. *Id.* at 9.

18. *Id.* at 18.

19. *Id.* at 8.

telephone service.²⁰ Until 1990, Mexico maintained Telmex as the state-owned monopoly telecommunications operator. In December of that year, the Mexican government began the privatization of Telmex by selling a 20.4 percent interest to a consortium consisting of SBC Communications Inc. (one of the seven American Regional Bell Operating Companies then called Southwestern Bell Corporation), France Telecom (the state-owned French telecommunications operator), and a group of Mexican investors led by Grupo Carso, S.A. de C.V.²¹ The consortium has voting control of Telmex; the Mexican investors have voting control of the consortium.²²

In 1990, Mexico's National Commission on Foreign Investment, the regulatory body responsible for administering the Foreign Investment Law and Regulations, ruled that Telmex's L shares were not subject to, and were not considered when determining compliance with, the foreign ownership restriction because the shares have only limited voting rights.²³ The A shares are similarly unrestricted.²⁴ To ensure that its privatization of Telmex fell within the foreign ownership constraints while allowing for some infusion of foreign capital and telecommunications expertise, the Mexican government sold 100 percent of the AA shares, constituting voting control of Telmex and representing 20.4 percent of Telmex's entire capital stock, to a trust for the benefit of the consortium mentioned above: SBC and France Telecom each own 24.5 percent of the AA shares; Grupo Carso owns 25.3 percent; Seguros de Mexico, S.A. owns 2.9 percent; two other inves-

20. *Id.* at 1.

21. SOUTHWESTERN BELL CORPORATION, 1993 SEC FORM 10-K, at 9 (1994).

22. SOUTHWESTERN BELL CORPORATION, 1993 ANNUAL REPORT 42 (1994).

23. TELÉFONOS DE MÉXICO, S.A. DE C.V., 1993 SEC FORM 20-F, at 17 (1994).

24. *Id.* at 17.